

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

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In the Matter of

Application of Ameritech Michigan Pursuant to
Section 271 of the Telecommunications Act of
1996 to Provide In-Region, InterLATA Services
in Michigan

CC Docket No. 97-137

REPLY COMMENTS OF BROOKS
FIBER COMMUNICATIONS OF MICHIGAN

Of Counsel:

Cheryl A. Tritt
Charles H. Kennedy
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Todd J. Stein
Brooks Fiber Communications of Michigan, Inc.
2855 Oak Industrial Drive, N.E.
Grand Rapids, Michigan 49525
(616) 224-4528

Counsel for Brooks Fiber Communications
of Michigan

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SUMMARY

The comments in this proceeding overwhelmingly oppose Ameritech's entrance into the in-region, interLATA communications market in Michigan. As an initial matter, Ameritech has failed to enter into a binding interconnection agreement with a predominantly facilities-based provider of business and residential service. More importantly, however, the comments of the Department of Justice ("DOJ") and the Michigan Public Service Commission ("MPSC") -- as well as the comments of many others -- all conclude that Ameritech has failed to provide all of the items required by the competitive checklist.

Further, a review of the comments shows that Ameritech's entry into the interLATA market at this time is clearly not in the public interest. This is an appropriately broad standard that not only permits, but requires, a focus on the viability of local competition in Michigan. Again, the comments of DOJ, the MPSC and others catalog the ways in which Ameritech has affirmatively hindered the development of local competition in Michigan. All of the competitive facilities-based providers in Michigan have independently reported similar instances of anticompetitive conduct by Ameritech. This conduct constitutes a serious barrier to competition, and, as a result, Ameritech's application must be denied.

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The commenters in this proceeding overwhelmingly oppose the granting of the application of Ameritech Michigan, Inc. ("Ameritech") for authority to provide in-region, interLATA communications service in Michigan. Most tellingly, both of the agencies that this Commission is required by statute to consult in this matter -- the United States Department of Justice ("DOJ") and the Michigan Public Service Commission ("MPSC") -- agree that Ameritech has not fully satisfied the competitive checklist set out in the Telecommunications Act of 1996 (the "Act"),¹ and DOJ makes the additional determination that granting Ameritech's application would be contrary to the public interest.² By contrast,

¹ Evaluation of the United States Department of Justice ("DOJ Evaluation") at 9; Consultation of the Michigan Public Service Commission ("MPSC Consultation") at 33-34, 37-40 and 43.

² DOJ Evaluation at 31, 34.

support for the application is confined primarily to the comments of three Bell regional holding companies, based on erroneous characterizations of the requirements of § 271.³

As Brooks Fiber Communications of Michigan, Inc. (“Brooks Fiber”)⁴ pointed out in its opposition to the Ameritech application, Ameritech has failed to comply with any of the particularized requirements of §271. Specifically, Ameritech has not entered into binding, approved agreements specifying the terms and conditions under which it is providing access and interconnection to its network facilities for the network facilities of one or more competing, predominantly facilities-based providers of business and residential service, and it has failed to comply with the competitive checklist. On this record, the application must be denied.⁵

³ Comments of Bell Atlantic (“Bell Atlantic Comments”); Comments of BellSouth Corporation and SBC Communications Inc. on Ameritech Michigan’s Application for Provision of In-Region InterLATA Services (“BellSouth/SBC Comments”).

⁴ Brooks Fiber is a competitive local exchange carrier (“CLEC”) doing business in the Grand Rapids and Lansing, Michigan LATAs, and one of only four CLECs operating in Michigan. Brooks Fiber is the only CLEC providing both business and residential services in Michigan.

⁵ Brooks Fiber Communications of Michigan, Inc. also supports the motion of the Association for Local Telecommunications Services, Inc. (“ALTS”) to dismiss Ameritech’s application.

I. The Comments Reveal Ameritech's Failure to Enter into a Binding Interconnection Agreement with a Predominantly Facilities-Based Provider of Business and Residential Service.

Ameritech's request to provide in-region interLATA services in Michigan was made pursuant to § 271(c)(1)(A) ("Track A").⁶ Track A requires that Ameritech enter into a binding interconnection agreement with a predominantly facilities-based provider of business and residential service. Since Brooks Fiber is the only competing provider of business and residential service in Michigan, its interconnection agreement with Ameritech must satisfy all of the Track A requirements. The comments filed in this proceeding clearly show that Ameritech has failed to satisfy this threshold requirement on several grounds.

First, Ameritech has failed to enter into a binding agreement with Brooks Fiber. All of the prices set forth in Brooks Fiber's interconnection agreement are interim prices. Final cost-based prices must be established before the agreement can be considered binding.⁷ Until final cost-based prices are established, the agreement cannot comply with the requirements of §271.

Second, the agreement with Brooks Fiber does not provide for all forms of access and interconnection required by the Act. Although Ameritech attempts to remedy this deficiency by reference to its "most favored nation" ("MFN") clause, its reliance on MFN is premature. Ameritech has had ample opportunity to address the deficiencies in Brooks

⁶ Since Ameritech has received a "qualifying request" for access and interconnection, the Act bars Ameritech from proceeding under § 271(c)(1)(B) ("Track B").

⁷ The DOJ explicitly acknowledged the importance of compliance with the cost-based pricing standards of the Act as a requirement for in-region interLATA entry. DOJ Evaluation at 41-43.

Fiber's interconnection agreement but has so far failed to do so. The various difficulties actually experienced by other commenters with regard to MFN casts significant doubt on Ameritech's claim that Brooks Fiber's MFN clause can be used to "complete" Brooks Fiber's agreement.⁸ Until Brooks Fiber's interconnection agreement is complete and actually provides for all forms of access and interconnection as required by the Act, it does not satisfy the requirements of § 271.

Finally, Brooks Fiber is not a predominantly facilities-based provider of business and residential service. Although DOJ apparently concluded that Brooks Fiber was a predominantly facilities-based provider based on the fact that it provides switching, transport and some loops,⁹ this finding is not supported by the record. Brooks Fiber relies on Ameritech-provided unbundled loops for approximately 61% of all business lines and 90% of all residential lines.¹⁰ The fact that Brooks Fiber may provide its own switching or transport does not change the fact that the preponderance of its business customers, and the vast preponderance of its residential customers, are served using Ameritech's facilities. The unbundled loop is the most important bottleneck facility controlled by the incumbent. Development of facilities-based competition cannot take place as contemplated by the Act without access to unbundled loops. As long as Brooks Fiber must rely predominantly on access to Ameritech's unbundled loops to serve its customers, it remains vulnerable to

⁸ See, e.g., TCG's May 8, 1997 Submittal of Supplemental Information in MPSC Case No. U-11104; and MPSC Consultation at 7.

⁹ DOJ Evaluation at 6-7.

¹⁰ Brooks Fiber Comments at 7.

discriminatory treatment by Ameritech with regard to provisioning intervals, loop quality, delays and outright refusal to provide such loops. Until a competitor is actually providing service to both business and residential customers without relying predominantly on Ameritech-provided unbundled loops, Ameritech cannot satisfy the requirements of § 271.

II. The Comments Demonstrate Ameritech's Failure to Comply with the Competitive Checklist.

The comments in this proceeding, and the many instances of noncompliance recounted in those comments, furnish an ample record of Ameritech's failure to meet the requirements of §271. Most importantly, both the DOJ and the MPSC agree with Brooks Fiber that Ameritech has failed to provide all of the access and interconnection items specified by the competitive checklist and the implementing rules adopted in the Commission's *Local Competition Order*.¹¹ DOJ finds that Ameritech is not providing unbundled local switching to its local exchange service competitors,¹² is not providing local transport as required by the *Local Competition Order*,¹³ has not configured its switches, support systems, and ordering and provisioning procedures as required to provide new entrants with a combination of local switching and transport,¹⁴ and has not developed and

¹¹ Implementation of Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 14171 (*"Local Competition Order"*).

¹² DOJ Evaluation at 10.

¹³ *Id.* at 12.

¹⁴ *Id.* at 20.

implemented wholesale support processes -- including automated OSS systems -- that are adequate to provide access to unbundled network elements.¹⁵ Similarly, the MPSC finds that Ameritech does not provide nondiscriminatory access to network elements,¹⁶ that Ameritech's compliance with checklist items v and vi is unresolved,¹⁷ and that the quality and accuracy of access to Ameritech's 911 databases is "at best, poor."¹⁸

These findings by the two agencies empowered by the Act to consult with the Commission in its disposition of Ameritech's application strongly support denial of the application. DOJ expressly recommends that the application be denied, and makes clear that Ameritech's failures to implement the Act are not based only on practical problems of implementation, but also on Ameritech's refusal to acknowledge its statutory obligations to its competitors.¹⁹ The MPSC, although characterizing its consultation as purely factual and making no recommendation, has made it clear that Ameritech has not met the statutory standard. These findings can only support denial of the application, because the Act

¹⁵ *Id.* at 22.

¹⁶ MPSC Consultation at 33-34.

¹⁷ *Id.* at 37-40. Item v requires the applying BOC to provide local transport from the trunks side of wireline local exchange carrier switch unbundled from switching of other services; item vi requires the applying BOC to provide local switching unbundled from transport, local loop transmission, or other services.

¹⁸ *Id.* at 43. The MPSC also finds that Ameritech is not providing intraLATA toll dialing parity and has provided the MPSC with erroneous information concerning intraLATA toll dialing parity. *Id.* at 55-57.

¹⁹ DOJ Evaluation at 11.

expressly does not permit this Commission to disregard *any* requirement of the competitive checklist in evaluating an application under §271.²⁰

The Commission also must reject the suggestion, made by the Governor of Michigan, that this Commission monitor Ameritech's efforts to cure its deficiencies and grant the application if Ameritech achieves compliance by the 90-day deadline for a Commission decision.²¹ The Commission has established a fair and efficient procedure for the disposition of applications under §271. Under that procedure, interested parties are given the opportunity to file comments and replies directed to the adequacy of a BOC's written application and supporting materials, and the Commission grants or denies interLATA authority on the basis of the application and comments. If the Commission now adopts the approach suggested by the Governor of Michigan, this procedure will be rendered meaningless. The Commission either will make its decision based upon developments not contained in the BOC's application, upon which interested parties have not had an opportunity to comment, or the Commission will be forced to reopen the notice-and-

²⁰ 47 U.S.C. §271(d)(4).

²¹ Letter from Governor John Engler to Chairman Reed Hundt, dated June 10, 1997 ("Governor's Comments"). Governor Engler states that where Ameritech's compliance with §271 is deficient, "it is reasonable to anticipate that the necessary corrections can be made prior to the date on which the FCC must act on the application." Governor Engler then asks that the FCC "use the full extent of [its] authority to assure that problems identified by the MPSC are not left unsolved due to inaction." The Governor does not, however, specify any action the FCC is empowered to take during the 90-day review period, except denial of Ameritech's application, in response to Ameritech's failure to comply with §271.

In any case, it should be noted that Ameritech has failed to make any effort to cure its deficiencies, choosing instead to continue to hinder the development of local competition in Michigan.

comment cycle at the end of the ninety-day review period so that any new facts on which the Commission proposes to rely can be addressed. The former course would result in a decision based on facts on which the Commission has not consulted with DOJ and the responsible state commission, as required by the Act, and on which interested parties have not had an opportunity to be heard. The latter course will drastically increase the burden the §271 process places on the Commission, and also will cause the Commission to miss the statutory, ninety-day deadline for decision on the application while it takes and reviews the additional round of comments.

The requirements of the Act can only be met if the burden is placed on the applying BOC to demonstrate, at the time its application is filed, that it is in full compliance with the requirements of §271. Where, as here, the necessary demonstration is not made, the application must be denied.

III. The Comments Support a Finding that Ameritech's Entry into the In-region, InterLATA Market at this Time Would not be in the Public Interest.

The Bell company comments contend that the Commission's discretion to consider the public interest implications of applications brought under §271, which the language of the Act does not limit in any way, is in fact stringently confined. Specifically, BellSouth and SBC argue that the Commission may consider only the effect of Ameritech's interLATA entry on *long-distance* competition.²² Bell Atlantic takes an even more restrictive view, and argues that the Commission may consider only "purposes of the Communications Act *other*

²² BellSouth/SBC Comments at 10.

than opening markets to competition.”²³ What the BOCs agree on is that the Congress has somehow forbidden the Commission to consider the condition of local competition in Michigan as part of its public interest inquiry.

The language of the Act, of course, gives no hint of this restriction on the Commission’s discretion. In fact, by directing the Commission to consider the “public interest, convenience and necessity,” the Congress deliberately adopted a standard that the courts consistently have interpreted as conferring the broadest possible grant of regulatory discretion.²⁴ And the Congress underscored the breadth of the public interest inquiry when it directed the Commission to give “substantial weight” to the views of DOJ, and stated in turn that the DOJ’s evaluation could be based upon “any standard the Attorney General considers appropriate.”²⁵

As DOJ, the Michigan Attorney General and other commenters have pointed out, the appropriate focus of the public interest inquiry under §271 is the status and viability of local competition in Michigan. The Act explicitly makes local competition a precondition of BOC

²³ Bell Atlantic Comments at 9 (emphasis in original). To add to the confusion, Ameritech’s Application offers yet a third version of the public interest standard, under which the Commission must grant a §271 application if the weakness of local competition is outweighed by the potential, competitive benefits of the BOC applicant’s entry into the interLATA market. Ameritech Application at 63-64. Like Bell Atlantic, BellSouth and SBC, Ameritech points to no language in the Act that limits the Commission’s inquiry to the proposed test.

²⁴ The Congress adopted the public interest test in spite of Senator McCain’s objection that the public interest standard “implies almost limitless policymaking authority to the FCC.” CompTel Comments at 36, citing 141 Cong. Rec. S7960 (daily ed. June 8, 1995).

²⁵ 47 U.S.C. §271(d)(2)(A).

entry into interLATA markets. This fact alone rebuts the BOCs' various claims that the Congress is primarily concerned with the need for additional competition in the interLATA market,²⁶ or intends the Commission to give greater weight to curing weaknesses in long-distance rather than local competition,²⁷ or intends the Commission to restrict its public interest inquiry to concerns wholly extraneous to competition.²⁸ The Congress structured the Act so that the prospect of interLATA entry would spur the BOCs to open their monopoly markets to competition, and the public interest demands that such authorization not be granted until the Commission is fully satisfied that the BOC applicant cannot use its continuing monopoly power to hinder, delay or destroy new entry after that incentive is removed.²⁹

Applying the public interest test to Ameritech's application requires that the application be denied. As the DOJ Evaluation states, new competition in Michigan is limited and vulnerable to anticompetitive measures by Ameritech, which remains "by far the dominant provider of local exchange services"³⁰ Under these circumstances, as DOJ points out, the long and varied list of instances of noncompliance and noncooperation by

²⁶ BellSouth/SBC Comments at 10.

²⁷ Ameritech Application at 64-71.

²⁸ Bell Atlantic Comments at 9.

²⁹ As Senator Kerry stated, the public interest inquiry is intended to "make certain that we do get competition at the local level." 141 Cong. Rec. S7970 (daily ed. June 8, 1995).

³⁰ DOJ Evaluation at 32.

Ameritech show that this is not the time to permit Ameritech to provide in-region, interLATA service.

In applying the public interest test to Ameritech's application, the Commission also should give particular weight to the comments of the Michigan Attorney General and the Michigan Consumer Federation -- two entities that have observed Ameritech's treatment of local competitors in Michigan at close hand. The Attorney General's comments recount a variety of means by which Ameritech has "vigorously resist[ed] all efforts at opening the local market."³¹ The Attorney General concludes that granting of the application would be "inconsistent with the public interest" and would "ensure that there will be no meaningful competition in Michigan for many more years."³² Similarly, the Michigan Consumer Federation concludes that grant of Ameritech's application would be "premature," and urges this Commission to hold out "long distance entry authority as the incentive for breaking up the [Ameritech] bottleneck . . ."³³ Local opinion, as expressed in a recent editorial by the Grand Rapids Press, is also opposed to premature grant of in-region interLATA authority: "The FCC should have no trouble denying Ameritech's long distance application. Better yet,

³¹ Comments of Michigan Attorney General Frank J. Kelley at 9.

³² *Id.* at 8.

³³ Comments of the Michigan Consumer Federation in Opposition to Ameritech Michigan's Application at 14.

Ameritech should withdraw its long distance application and try when local competition really exists.”³⁴

IV. The Comments Illustrate that Ameritech has Actively Engaged in a Pattern and Practice of Anticompetitive Activities to Discourage Local Competition.

Ameritech bases its application on interconnection agreements with three unaffiliated facilities-based providers of local exchange service: Brooks Fiber, MFS (also, WorldCom) and TCG.³⁵ As the only competitive facilities-based providers of local exchange service in Michigan, Brooks Fiber, MFS and TCG are in a unique position to observe first hand exactly how Ameritech is complying with the Act’s mandate to open the local exchange market to competition.

Brooks Fiber, MFS and TCG have all filed comments regarding Ameritech’s activities with regard to local competition. Given Ameritech’s oft-expressed desire to be the first RBOC to provide in-region interLATA service, one might expect that Ameritech would encourage the development of competition for local service. However, Ameritech has done just the opposite. As the comments filed by Brooks Fiber, MFS and TCG illustrate, Ameritech appears to be engaging in a remarkable pattern and practice of anticompetitive activities designed to maintain its monopoly position by discouraging, and sometimes even preventing, the development of local competition.

³⁴ *A Call for Competition*, The Grand Rapids Press, June 30, 1997 at A12, Col. 1 (attached as Exhibit A).

³⁵ Ameritech Application at 9-11.

In their comments, Brooks Fiber, MFS and TCG have independently reported experiencing similar instances of anticompetitive conduct by Ameritech. While Brooks Fiber will not repeat here the anticompetitive actions experienced by all three carriers (which are enumerated in their initial comments), Ameritech's anticompetitive activities clearly have had a significant negative impact on the development of competition for local service in Michigan. In the absence of barriers to competition, one would ordinarily expect that competition for local exchange service would develop very quickly. However, the fact is that competition has been very slow to develop in Michigan. The reason for this delay is that Ameritech has been extraordinarily successful in delaying, preventing and denying the development of competition by the erection of barriers to competition through anticompetitive activities and the discriminatory treatment of competitors. Furthermore, the fact that every facilities-based competitor in Michigan has experienced the same kind of anticompetitive treatment from Ameritech strongly suggests that Ameritech is intentionally delaying, preventing and denying the development of competition in Michigan. These problems are not mere "implementation glitches" that can be shrugged off by Ameritech, or left to its victims to "seek enforcement . . . in the appropriate forum."³⁶ Ameritech's anticompetitive behavior constitutes a serious barrier to competition which the Commission *must* take into consideration when ruling upon Ameritech's application. Based on the record developed in this case, it is clear that Ameritech's application must be denied.


³⁶ BellSouth/SBC Comments at 9.

CONCLUSION

The record in this proceeding demonstrates that Ameritech, once again, has filed a premature application for in-region, interLATA authority for which no persuasive case can be made. This application should be dismissed or, at the very least, denied with an admonition to Ameritech to seek a grant of authority under §271 only after it has complied with the requirements of §271. As Chairman Hundt recently said, "[t]he power to enter the long distance market lies in the hands of the Bell Companies -- if they have the will, the law makes clear the way."³⁷

Respectfully Submitted:

Brooks Fiber Communications
of Michigan, Inc.

 Todd J. Stein /JEN

By: Todd J. Stein
Its: Attorney
2855 Oak Industrial Drive, N.E.
Grand Rapids, Michigan 49525
(616) 224-4358

Of Counsel:

Cheryl A. Tritt
Charles H. Kennedy
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

July 7, 1997

³⁷ *Application of SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma*, CC Docket No. 97-121, Memorandum Opinion and Order released June 26, 1997, Separate Statement of Chairman Reed E. Hundt.

COMMENT

The Grand Rapids Press

105th YEAR - NUMBER 289

Dan Gaydou	PUBLISHER	222-5618
Michael Lloyd	EDITOR	222-5508
Joseph Crawford	EDITORIAL PAGE EDITOR	222-5483

IN OUR OPINION

A call for competition

*Justice Dept. correctly finds
Ameritech has few serious rivals*

The U.S. Justice Department handed Michigan residents a crucial victory in saying that Ameritech Corp. should not yet be allowed into long distance telephone service. The decision could help increase competition for local telephone service and reduce rates.

Under federal law, Ameritech Corp. can enter long distance phone service only when the company has competition for local telephone service. The Justice Department last week said that the standard hasn't been met.

The finding is important in several ways. First, the Federal Communications Commission, which must make a final decision on Ameritech's application by Aug. 19, will rely heavily on the recommendation. Second, the judgment sends a message about competition to the Michigan Public Service Commission. The MPSC this month determined that Ameritech had substantially met the competition requirements. Perhaps now the state agency will take a firmer position on what constitutes competition. And third, the Justice Department decision more clearly defines "competition." Ameritech contends competition exists because other companies are free to enter the market. The Justice Department's more reasonable standard says that competition must be meaningful, with Ameritech losing more than a pittance of market share throughout the state.

In Michigan, Ameritech has competitors in just one area, Grand Rapids. Even that situation is lopsided. Five competitors have made only small inroads. Their task is difficult. All say Ameritech takes too long in switching customers who choose the rival companies. AT&T, which uses Ameritech lines, won't sign up business customers because it says there are many potential glitches which Ameritech is slow to fix.

Competition is breaking out everywhere in telecommunications, all to the benefit of consumers. Long distance telephone rates have dropped an average of 70 percent (more for business, less for residential) since AT&T's monopoly was broken in 1984. Cellular telephone rates are falling and will continue to drop with greater competition. The last battleground is local telephone service, where rates are rising under existing monopolies. The FCC should have no trouble denying Ameritech's long distance application. Better yet, Ameritech should withdraw its long distance application and try when local competition really exists.

CERTIFICATE OF SERVICE

I, Kimberly E. Thomas, do hereby certify that the foregoing **REPLY COMMENTS OF BROOKS FIBER COMMUNICATIONS OF MICHIGAN** was mailed on this 7th day of July, 1997, via first class U.S. mail to the following:

William F. Caton, Acting Secretary *
Federal Communications Commission
1919 M Street, N.W. - Room 222
Washington, D.C. 20554

Larry Atlas *
Associate Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W. - Room 500
Washington, D.C. 20554

Chairman Reed E. Hundt *
Federal Communications Commission
1919 M Street, N.W. - Room 814
Washington, D.C. 20554

A. Richard Metzger *
Deputy Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W. - Room 500
Washington, D.C. 20554

Commissioner James H. Quello *
Federal Communications Commission
1919 M Street, N.W. - Room 802
Washington, D.C. 20554

Don Russell, Chief
Telecommunications Task Force
Antitrust Division
US Department of Justice
Room 8104 Judiciary Center
55 4th Street, N.W.
Washington, D.C. 20001

Commissioner Susan Ness *
Federal Communications Commission
1919 M Street, N.W. - Room 832
Washington, D.C. 20554

Richard J. Metzger, General Counsel
Association of Local Telecommunications
Services
1200 19th Street, N.W.
Washington, D.C. 20036

Commissioner Rachelle B. Chong *
Federal Communications Commission
1919 M Street, N.W. - Room 844
Washington, D.C. 20554

Dorothy Wideman
Secretary
Michigan Public Service Commission
6545 Mercantile Way
P.O. Box 30221
Lansing, Michigan 48909-7721

Regina Keeney, Chief *
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W. - Room 500
Washington, D.C. 20554

Kelly R. Welsh
John T. Lenahan
Michael J. Karson
Larry R. Peck
Gary L. Phillips
Ameritech Corporation
30 South Wacker Drive
Chicago, IL 60606

John M. Dempsey
Craig A. Anderson
Ameritech Michigan
444 Michigan Avenue
Detroit, MI 48226

Stephen M. Shapiro
Theodore A. Livingston
Douglas A. Poe
John E. Muench
Christian F. Binnig
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, IL 60603

Antoinette Cook Bush
Mark C. Del Bianco
Skadden, Raps, Slate, Meagher & Flom
1440 New York Avenue, N.W.
Washington, D.C. 20005

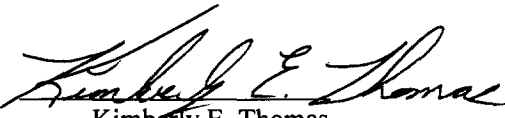
ITS, Inc. *
1231 20th Street, N.W.
Washington, D.C. 20037

* Hand Delivered

John Gockley
Ameritech Communications Incorporated
9525 West Bryn Mawr
Rosemont, IL 60018

Kenneth S. Geller
Mark H. Gitenstein
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Frank J. Kelley
Attorney General
State of Michigan
P.O. Box 303212
Lansing, MI 48909



Kimberly E. Thomas

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